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No. 79-1709

# In the Supreme Court of the United States

OCTOBER TERM, 1979

THOMAS J. ALBERNAZ AND EDWARD RODRIGUEZ,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 26a-55a) is reported at 612 F. 2d 906. The opinion of the panel (Pet. App. 1a-21a) is reported at 585 F. 2d 1234.

### JURISDICTION

The judgment of the court of appeals was entered on February 27, 1980. Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to April 27, 1980, and the petition was filed on April 28, 1980 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether consecutive sentences were properly imposed upon petitioners' convictions for conspiracy to import

marihuana, in violation of 21 U.S.C. 963, and conspiracy to distribute marihuana, in violation of 21 U.S.C. 846.

## STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiracy to import marihuana (Count 1) and conspiracy to distribute marihuana (Count 2), in violation of 21 U.S.C. 963 and 846. Petitioner Rodriguez was sentenced to consecutive terms of four and one-half years' imprisonment on each count, to be followed by consecutive two-year special parole terms. Petitioner Albernaz was sentenced to consecutive terms of three and one-half years' imprisonment on each count, to be followed by consecutive two-year special parole terms.[1] A panel of the court of appeals affirmed (Pet. App. 1a-21a). On rehearing en banc, limited to the issue of cumulative punishment for conviction on the two conspiracy counts, petitioners' consecutive sentences were affirmed, one judge dissenting (Pet. App. 26a-55a).

The pertinent evidence is set forth in the opinion of the panel (Pet. App. 5a-7a). In late December 1976 undercover Drug Enforcement Administration (DEA) Agent Theodore Weed was introduced to petitioner Albernaz, who was seeking boats that could be used for unloading large quantities of marihuana from a freighter at sea and transporting the marihuana to the Florida coast. Weed represented that he had such a vessel available. Albernaz

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[1]Neither petitioner challenges the propriety of imposing a special parole term as part of his sentence for the narcotics conspiracy offenses. In *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980), this Court held that a special parole term may not be imposed upon a defendant convicted of narcotics conspiracy. In light of the decision in *Bifulco*, petitioners may move the district court for correction of their sentences under Rule 35, Fed. R. Crim. P.

offered to pay Weed $200,000 or ten percent of the value of the cargo, which was estimated to be 40,000 pounds.

During the next several weeks Albernaz and Weed held numerous meetings, at which Weed met other individuals involved in the importation scheme, including petitioner Rodriguez. In turn, Weed introduced the conspirators to other undercover agents, including John McCutcheon, whom Weed represented were assisting him in preparing his vessel for the unloading operation.

By late January 1977 the parties were prepared to carry out the scheme. Plans were made by the agents to use a vessel known as the *Catchalot II*, whose captain was cooperating with the agents. Petitioner Albernaz gave the captain and Agent McCutcheon their final instructions, including the coordinates for a rendezvous with the freighter at sea and codes to be used when communicating with it.

The *Catchalot II*, with a crew of DEA agents, Customs agents, and civilians, left West Palm Beach on the evening of January 27. For the next two days that vessel attempted unsuccessfully to meet the freighter. Notified of the difficulty, petitioners, together with co-defendant William Martins, chartered a plane on January 31 and flew over the freighter and the *Catchalot II*; messages were dropped to each indicating the location of the other vessel. That afternoon the two vessels established contact, and 150 bales of marihuana were transferred from the freighter to the *Catchalot II*.

The transfer of additional bales was deferred until later. The *Catchalot II* then moved a short distance away from the freighter and awaited the arrival of the Coast Guard, which had been notified of the transaction. Several hours later a Coast Guard vessel arrived, seized the freighter,

and arrested the crew. At about the same time petitioners were arrested by DEA agents in a Miami hotel.

In affirming petitioners' sentences, the en banc court of appeals held (Pet. App. 30a-42a) that Congress intended to permit the imposition of consecutive sentences upon defendants convicted of both conspiracy to import marihuana, in violation of 21 U.S.C. 963, and conspiracy to distribute marihuana, in violation of 21 U.S.C. 846. The court also held (Pet. App. 42a-48a) that where Congress has authorized cumulative punishments for violations of two statutory provisions, the imposition of consecutive sentences in a single sentencing proceeding following a single trial does not violate the Double Jeopardy Clause.[2]

## ARGUMENT

The sole issue raised by petitioners involves the propriety of the cumulative sentences imposed on their

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[2]In the original panel opinion, the court of appeals reversed the convictions of co-defendants Smigowski and Martins for conspiracy under 21 U.S.C. 846, finding that the evidence was insufficient to show their involvement in a conspiracy to distribute the marihuana once it reached the United States (Pet. App. 16a-17a). As to petitioners, however, the panel found sufficient evidence that they had arranged to transport and distribute the marihuana in this country (Pet. App. 15a-16a). The en banc court reaffirmed the panel's disposition (Pet. App. 28a-29a nn.1-3). Petitioners, together with Smigowski and Martins, have filed a separate petition (No. 79-1930) seeking review of their convictions with regard to issues other than the sentencing issue involved in the present petition.

In addition, the 13 members of the freighter's crew were charged as co-conspirators, tried separately, and convicted. On appeal, the same panel that decided petitioners' appeal affirmed the crew members' convictions for conspiracy to import marihuana, while reversing a conviction for conspiracy to distribute as to the one individual among the 13 whose sentence on the two counts had not been ordered to run concurrently. *United States* v. *Cadena*, 585 F. 2d 1252, 1266 (5th Cir. 1978).

separate convictions for conspiracy to import marihuana, in violation of 21 U.S.C. 963, and conspiracy to distribute marihuana, in violation of 21 U.S.C. 846.[3] Petitioners contend that since the government proved only a single agreement encompassing both importation and distribution, the imposition of consecutive sentences is contrary to the intent of Congress in enacting the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801 *et seq.*, and is barred by principles of double jeopardy. These contentions were correctly rejected by the en banc court of appeals in a thorough opinion upon which we largely rely.

1. a. Relying primarily on *Braverman* v. *United States*, 317 U.S. 49 (1942), petitioners argue that "it is the agreement that constitutes the offense" of conspiracy (Pet. 15), and thus "a single agreement with multiple objectives * * * affords a single basis for conspiratorial liability and * * * permits imposition of but a single punishment" (Pet. 16). We submit that petitioners' reliance upon *Braverman* is misplaced.

In *Braverman* this Court concluded that a single agreement to commit several unlawful acts could not be punished by multiple convictions under the predecessor to the general conspiracy statute, 18 U.S.C. 371. That holding did not reach the circumstances presented here, where two specific and distinct conspiracy statutes have been violated.[4] Rather, this situation is similar to that

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[3]The length of the combined sentences imposed on each petitioner exceeds the maximum five-year sentence permissible under either Section 963 or Section 846 for marihuana offenses (see Pet. App. 29a n.4).

[4]That the decision in *Braverman* was limited to a situation in which a single general conspiracy statute has been violated is made evident by the following language in the Court's opinion (317 U.S. at 54):

> The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute, §37 of

presented in *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946), where the defendants, convicted of conspiracy to restrain trade, in violation of Section 1 of the Sherman Act, and conspiracy to monopolize, in violation of Section 2 of that statute, argued that *Braverman* barred two convictions and separate punishments for what they alleged was "but one conspiracy, namely, a conspiracy to fix prices" (328 U.S. at 788). This Court rejected the claim, holding that a single agreement with several unlawful objects might amount to more than one conspiracy if different elements of the agreement violate different conspiracy statutes (*ibid.*):

> In contrast to the single conspiracy described in (*Braverman*) in separate counts, all charged under the general conspiracy statute, * * * we have here separate statutory offenses, one a conspiracy in restraint of trade that may stop short of monopoly, and the other a conspiracy to monopolize that may not be content with restraint short of monopoly. One is made criminal by § 1 and the other by § 2 of the Sherman Act.

The same reasoning applies here. Petitioners violated two distinct criminal statutes, each aimed at preventing a different evil and each prescribing a separate punishment. After examining the structure and history of the Drug Abuse Act and employing customary rules of statutory construction, the en banc court of appeals properly concluded (Pet. App. 37a-42a) that, by enacting these separate conspiracy provisions within the same comprehensive statutory scheme, Congress determined that a

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the Criminal Code. For such a violation, only the single penalty prescribed by the statute can be imposed.

Cf. *Sanabria* v. *United States*, 437 U.S. 54, 69-71 (1978).

case where the evidence was sufficient to prove a conspiracy both to import marihuana into the United States and to distribute that marihuana within the country was deserving of greater potential punishment than a case where the evidence was sufficient to prove a conspiracy with only one of these objectives.

The decision below is consistent with the "rule of statutory construction stated in by this Court *Blockburger* v. *United States*, 284 U.S. 299, and consistently relied on ever since to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively." *Whalen* v. *United States*, No. 78-5471 (Apr. 16, 1980), slip op. 7 (footnote omitted). The test in *Blockburger* v. *United States*, 284 U.S. 299 (1932) is satisfied "[i]f each [offense] requires proof of a fact that the other does not * * * notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli* v. *United States*, 420 U.S. 770, 785 n. 17 (1975). See *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977). Here, as in *American Tobacco Co.* v. *United States*, *supra*, 328 U.S. at 788, each of the specific conspiracy statutes requires proof of a different element. It is thus reasonable to conclude that Congress, "not a body of laymen unfamiliar with the commonplaces of our law" (*Callanan* v. *United States*, 364 U.S. 587, 594 (1961)), intended to permit cumulative punishment in enacting two statutes defining separate offenses under the *Blockburger* test.[5]

Petitioners urge that absent an express declaration of congressional intent to punish cumulatively, the rule of lenity compels the conclusion that consecutive sentences may not be imposed. But, as this Court has recognized,

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[5]The assumption underlying the *Blockburger* test "is that Congress ordinarily does not intend to punish the same offense under two different statutes." *Whalen* v. *United States*, *supra*, slip op. 7.

the rule of lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan* v. *United States*, *supra*, 364 U.S. at 596 (footnote omitted). See also *United States* v. *Batchelder*, 442 U.S. 114, 121 (1979); *United States* v. *Culbert*, 435 U.S. 371, 379 (1978). In the instant case there is no ambiguity to resolve, given the enactment by Congress of separate specific statutes with different elements as part of a comprehensive statutory scheme.[6]

In sum, the court of appeals properly upheld the multiple convictions and consecutive sentences imposed upon petitioners under Sections 846 and 963. Accord, *United States* v. *Garner*, 574 F. 2d 1141, 1146-1147 (4th Cir.), cert. denied, 439 U.S. 936 (1978)[7]; *United States* v. *Marotta*, 518 F. 2d 681, 684-685 (9th Cir. 1975). See also *United States* v. *James*, 494 F. 2d 1007, 1025-1026 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974).[8]

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[6]In *Gore* v. *United States*, 357 U.S. 386 (1958), this Court rejected a similar argument that the rule of lenity prohibited consecutive sentences for violation of three narcotics statutes by a single sale, stating that "Congress has manifested an attitude not of lenity but of severity toward violation of the narcotics laws." *Id.* at 391. As the court below correctly observed (Pet. App. 37a), "Congress's desire to severely punish those involved with narcotics did not abate after *Gore*."

[7]See especially the comment of Mr. Justice Stewart, dissenting on other grounds from the denial of certiorari in *Garner*, 439 U.S. 936-937 n.1.

[8]We note that the proposed federal criminal code revision that was reported by the Senate Judiciary Committee in January 1980 contains a general conspiracy statute that applies to virtually all substantive offenses in the proposed code, including importation and distribution of narcotics. S. 1722, 96th Cong., 2d Sess. § 1002 (1980). Under Section 1002(e), a person convicted of conspiracy may receive the same sentence provided for the most serious offense which is an object of the conspiracy. An individual convicted of conspiracy to

b. We recognize that two circuits, relying on *Braverman*, have held that an individual who enters into a single agreement to import and distribute a controlled substance may not be separately convicted and punished under 21 U.S.C. 846 and 963. *United States* v. *Honneus*, 508 F. 2d 566 (1st Cir. 1974), cert. denied, 421 U.S. 948 (1975); *United States* v. *Adcock*, 487 F. 2d 637 (6th Cir. 1973). For the reasons discussed above, we believe that these cases are based upon a misinterpretation of the decision in *Braverman*. Moreover, as noted by the court of appeals here (Pet. App. 34a), the Sixth Circuit in *Adcock* did not discuss legislative intent at all, and the First Circuit in *Honneus* made only a tangential reference to the intent of Congress. Subsequent to the time that *Adcock* and *Honneus* were decided, however, this Court has emphasized that the permissibility of cumulative punishments turns on whether Congress intended to punish each statutory violation separately. See *Whalen* v. *United States*, *supra*, slip op. 4; *Simpson* v. *United States*, 435 U.S. 6, 12 (1978); *Jeffers* v. *United States*, 432 U.S. 137, 155 (1977) (plurality opinion); *Iannelli* v. *United States*, *supra*, 420 U.S. at 785-786 & n.17. This is precisely the approach followed by the court below (see Pet. App. 30a-32a).

In view of the foregoing decisions of this Court, as well as the intervening decisions of the Fourth, Fifth, and Ninth Circuits all rejecting petitioners' position, we believe there is a substantial likelihood that the First and Sixth Circuits, if presented with the issue today, would reconsider the holdings in *Honneus* and *Adcock* and

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import or traffic in over 300 grams of marihuana may be punished by imprisonment for up to ten years. S. 1722, *supra*, § 1812(b)(2). Thus, while under the proposed code petitioners would be subject to only one conviction for conspiracy, the sentences they could receive are the same as the total sentence each could have received under the present statutory scheme as the court of appeals interpreted it.

reach the same conclusion as the court of appeals in this case. In addition, there is a possibility that the proposed revision of the criminal code will be enacted, which would render the issue of no continuing importance (see note 8, *supra*). Under all the circumstances, we submit that petitioners' claim of a conflict among the circuits is not sufficient to warrant review in this case.

2. Petitioners contend (Pet. 19-24) that even if Congress has authorized cumulative punishments for violations of Sections 846 and 963, the imposition of such punishments violates the constitutional prohibition against being placed twice in jeopardy for the same offense. This contention is without merit.

To begin with, conspiracy to import a controlled substance, in violation of 21 U.S.C. 963, and conspiracy to distribute a controlled substance, in violation of 21 U.S.C. 846, are two separate and distinct offenses requiring proof of different elements under the *Blockburger* test. That test "is a guide for determining when two separately defined crimes constitute the 'same offense' for double jeopardy purposes." *Simpson* v. *United States*, *supra*, 435 U.S. at 11. The fact that conspiracy, instead of substantive, offenses are involved is irrelevant for purposes of determining whether the offenses are the "same" within the meaning of the Double Jeopardy Clause. Assuming that there was only one agreement with two criminal objects, this case is indistinguishable from one in which a defendant is convicted and punished cumulatively for a single "act" or "transaction" that violates two substantive statutes with distinct elements. It is settled that cumulative punishments are constitutionally permissible in such a situation. See *Brown* v. *Ohio*, *supra*, 432 U.S. at 166.

Petitioners assert (Pet. 23), however, that the *Blockburger* test inevitably authorizes cumulative

punishments where a single agreement with multiple objectives is divided into separate conspiracy counts. This assertion is incorrect. It may be inappropriate to apply *Blockburger* where, as in *Braverman*, only a single general conspiracy statute forms the basis for multiple conspiracy charges, but that is not necessarily because of the peculiar nature of the crime of conspiracy, but because the *Blockburger* test was formulated to determine whether cumulative punishments are permissible for offenses defined in "two distinct statutory provisions" (*Blockburger* v. *United States*, *supra*, 284 U.S. at 304), not for multiple violations of a single statute. Indeed, this Court upheld the *Blockburger* test against a similar constitutional attack in *Gore* v. *United States*, 357 U.S. 386, 392-393 (1958), and specifically applied the test in the context of conspiracy convictions under two separate statutory provisions in *American Tobacco Co.* v. *United States*, *supra*.[9]

Finally, petitioners' assertion (Pet. 20-21) that the Double Jeopardy Clause authorizes the courts to strike down cumulative punishments *regardless* of congressional intent is directly contrary to the teaching of *Whalen* v. *United States*, *supra*, slip op. 4-5, that it is the duty of Congress, not the courts, to define crimes and fix punishments. See also *Brown* v. *Ohio*, *supra*, 432 U.S. at 165; *Sanabria* v. *United States*, 437 U.S. 54, 69 (1978). While there undoubtedly are constitutional limitations upon the powers of the Legislative Branch, those limitations derive from other provisions of the Constitution. See *Whalen* v. *United States*, *supra*, slip op. 5 n.3.

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[9]The cases cited by petitioners (Pet. 23) in support of their claim that *Blockburger* should not be used to determine the permissibility of cumulative punishments for conspiracy are inapposite. Each of those cases involved successive prosecutions for conspiracies charged under the same statutory provision. This case involves neither successive prosecutions nor a single statute.

Thus, as the court of appeals observed (Pet. App. 48a), "Congress could [not] so fragment a conspiracy that the aggregate punishment becomes cruel and unusual, but protection from that action derives from the Eighth Amendment, not the Double Jeopardy Clause."

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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